ORIGINAL

NO. 81644-1

THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE: DETENTION OF DAVID MCCUISTION

STATE OF WASHINGTON,

Respondent,

v.

DAVID MCCUISTION,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

PETITIONER'S BRIEF ON RECONSIDERATION

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A. ARGUMENT.

THE STATE CANNOT CONSTITUTIONALLY CONFINE A PERSON INDEFINITELY WHEN HE IS NOT BOTH MENTALLY AND CURRENTLY DANGEROUS AS A RESULT OF THAT MENTAL ILLNESS

Since 1998, David McCuistion has been involuntarily confined at the Special Commitment Center (SCC). At the SCC, he is "a very capable and well-regarded man." CP 585 (Finding of Fact 7). He "has proven himself to be a hard worker." Id. SCC staff members who see him on a daily basis have never seen him act aggressively or violently. CP 638-47. He has not engaged in inappropriate sexual behavior. Id. He has gained this behavioral control over time, by experiencing the severe consequences of his past actions, learning tools for self-improvement as he ages and in his daily interactions at the SCC. CP 62. Psychologist Dr. Lee Coleman reviewed current and past assessments of McCuistion and "formed the opinion that his evaluators have not presented any evidence that such a mental abnormality exists or has ever existed" necessary to meet the statutory criteria of RCW Ch. 71.09. CP 616-17.

The state enacted the civil commitment law that permits McCuistion's involuntary commitment in 1990. From 1990 until

2005, an involuntarily confined person could petition for release annually by offering evidence that he was no longer mentally ill or dangerous. In 2005, the Legislature changed the criteria for when a person may receive a trial to ascertain whether he remains eligible for commitment. Now, a person cannot secure a new trial unless he or the State prove that he has successfully completed treatment or becomes permanently physically incapacitated. In no case can a person use a single demographic factor to show he no longer poses the danger required for commitment.

In a decision issued September 2, 2010, this Court held that the 2005 amendments altering the criteria for obtaining a full trial after commitment are unconstitutional because they are not narrowly tailored to the current mental disorder and dangerousness that define the State's interest in continuing a person's involuntary commitment. In re Det. of McCuistion, 169 Wn.2d 633, 238 P.3d 1147 (2010). The changes "artificially limit[ ] the type of information that is relevant to continued SVP commitment," which allows detention of a person who is "no longer mentally ill and dangerous, and therefore disrupt the narrow tailoring present in the preamendment statute." Id. at 644. This Court has granted the State's motion to reconsider and invited further briefing.

1. PROLONGED INVOLUNTARY COMMITMENT IS A MASSIVE CURTAILMENT OF LIBERTY THAT HAS LONG BEEN PREDICATED ON REQUIRING CURRENT MENTAL ILLNESS AND DANGEROUSNESS.

Even if a detainee's involuntary confinement was initially permissible, "it could not constitutionally continue after that basis no longer existed." O'Connor v. Donaldson, 422 U.S. 563, 574-75, 95 S.Ct 2486, 45 L.Ed.2d 396 (1975). The "outside limits" on civil commitment are that the individual is mentally ill and dangerous due to that mental illness. Foucha v. Louisiana, 504 U.S. 71, 78 & n.5, 112 S.Ct. 1780, 118 L.Ed.2d 437 (1992). A person may be held "as long as he is both mentally ill and dangerous, but no longer." Id. at 77; see In re Levias, 83 Wn.2d 253, 257, 517 P.2d 588 (1973) ("neither logic nor law" permits state to involuntarily detain persons "who are not unsafe" for purpose of state offering beneficial treatment). The freedom lost by involuntary civil commitment is at "the core of the liberty interest protected by the due process clause." Foucha, 504 U.S. at 80.

There are "substantive constitutional limitations" on a person's detention predicated on mental impairment. Jackson v. Indiana, 406 U.S. 715, 737, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972). Our constitution protects an individual from being involuntarily

committed and indefinitely held absent a compelling interest and under criteria that are narrowly tailored to serve that compelling interest. In re Det. of Young, 122 Wn.2d 1, 26, 857 P.2d 989 (1993); In re Schouler, 106 Wn.2d 500, 508, 723 P.2d 1103 (1986) (limitations on privacy and liberty of involuntary committed person must be narrowly drawn to serve compelling interest); U.S. Const. amends. 5, 14; Const. art. I, § 3.

There is no constitutional basis for holding someone indefinitely if that person is not dangerous. O'Connor, 422 U.S. at 575; Jones v. United States, 463 U.S. 354, 368, 103 S.Ct. 3043, 77 L.Ed.2d 3043 (1984) (insanity acquitee "entitled to release" when no longer dangerous or has recovered sanity); Foucha, 504 U.S. at 78 ("error" for court below to attribute "no constitutional significance" to Court's holding that confinement may not continue without proof of dangerousness and mental illness); Levias, 83 Wn.2d at 587 (state's interest in confining non-dangerous persons "is less than compelling"). Accordingly, the substantive criteria for continued commitment may not stray from the outside limits of a constitutionally permissible confinement: current mental illness and dangerousness due to that mental illness.

2. PERIODIC REVIEW IS A CENTRAL COMPONENT OF THE CONSTITUTIONALITY OF AN INDEFINITE CIVIL COMMITMENT SCHEME

"[P]eriodic review of the patient's suitability for release" is essential for the constitutionality of involuntary civil commitment. Jones, 463 U.S. at 368. The considerations underlying non-criminal confinement are continuing illness and dangerousness, and those are the touchstone for determining the permissibility of continued confinement. Id. at 369.

This Court and the United States Supreme Court have upheld civil commitment laws only after ensuring that the statutes in question require periodic review and mandate release when a person no longer suffers from a mental abnormality rendering him unable to control his dangerousness. Kansas v. Hendricks, 521 U.S. 346, 364, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997); see Young, 122 Wn.2d at 39 (RCW 71.09 commitment narrowly tailored by offering periodic review and restricting duration to proof of "current mental condition and continuing dangerousness to the community."); see also In re. Det. Ambers, 160 Wn.2d 543, 553 n.7, 158 P.3d 1144 (2007) (noting constitution mandates meaningful annual review); In re Det. of Petersen, 145 Wn.2d 789,

795-96, 42 P.3d 952 (2002) ("Both this Court's opinions and those of the United States Supreme Court heavily favor placing the burden of proof on the State in former RCW 71.09.090(2) show cause hearings.").

In Hendricks, the Supreme Court emphasized that the ability to secure release was central to the statute. "If, at any time," the confined person is adjudged 'safe to be at large,' he is statutorily entitled to immediate release." 521 U.S. at 364.[1] The review process required that every year, "a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement." Id. The Supreme Court concluded that this periodic review system "demonstrates" the State of Kansas had no intent to confine a person "any longer than he suffers from a mental abnormality rendering him unable to control his dangerousness." Id.

The Kansas scheme is similar to the preamendment version of Washington's system of annual review. Upon a showing of probable cause that a person has so changed, the court must order a full hearing on whether the person meets the criteria for

commitment. In re Sipe, 239 P.3d 871, 877 (Kan.App. 2010); K.S.A. 59-29a08 (full text attached as Appendix A).[2]

The case of Andre Young is instructive. Young secured a new hearing based on evidence that his advancing age significantly lowered the risk that he would commit dangerous acts in the future, and the legislature responded by enacting the 2005 amendments prohibiting a person from receiving a full hearing on annual review based on evidence that reduced dangerousness resulted from advancing age. Ambers, 160 Wn.2d at 549-50 (explaining impetus for 2005 amendments); In re Det. of Young, 120 Wn.App. 753, 761-62, 86 P.3d 810, rev. denied, 152 Wn.2d 1035 (2004).

Several years later, the State's own evaluators agreed that due to his age, Young is no longer likely to commit sexually violent offenses.[3] Even though Young did not participate in the SCC's treatment program, the State willingly released him with conditions

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[1] In Ambers, this Court explained that the "safe to be at large" language rests on the definition of the criteria for initial commitment and does not impose a more stringent standard for when a person may be released. 158 Wn.2d at 552.

[2] The Kansas scheme was enacted in 1994, has about 159 people presently committed, has an average per person cost far less than Washington's, and the state maintains a "probable cause" of change standard on annual review without apparent turmoil resulting from this annual review process. See Kansas Legislator Briefing Book 2011, Judiciary, P-4 Sex Offenders/Sex Predators, p. 3; available at: http://www.skyways.org/ksleg/KLRD/Publications/2011Briefs/p-4.pdf.

so minimal that it considers his release to be unconditional. Id. King County Prosecutor Dan Satterberg said his office agreed to release Young "[q]uite clearly, because of his age," which made him far less likely to reoffend. Id.

Bradley Ward's case is also instructive. He committed several sex offenses as a juvenile that culminated in his commitment under RCW 71.09. In re Det. of Ward, 125 Wn.App. 381, 384-85, 104 P.3d 747 (2005). He sought release on annual review based, in part, on a reevaluation of his recidivism risk. A psychologist explained that the actuarial tests measuring likelihood of reoffending were not created or validated for juveniles. Id. at 388. The expert stated, "because Ward is no longer a juvenile, his recidivism risk is very low." Id.

Incorporating the age of the person at the time of the offense into the risk prediction as the psychologist did in Ward's case finds support in other authorities. See e.g., Graham v. Florida, _ U.S. _, 130 S.Ct. 2011, 2026, 176 L.Ed.2d 825 (2010) ("developments in psychology and brain science continue to show

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[3] Jennifer Sullivan, "Rapist Freed After 20 Years," Seattle Times, July 7, 2010, available at: http://seattletimes.nwsource.com/html/localnews/2012303061_young08m.html.

fundamental differences between juvenile and adult minds.");[4] Soothill, Keith, "Sex Offender Recidivism," 39 Crime and Justice 145, 173 (2010) ("risk prediction methods used for adult sex offenders are not appropriate for adolescent populations."). Emerging research demonstrates that, at best, "the predictive power of juvenile psychopathy assessments is quite weak." Brief for American Psychological Association *et al*, Florida v. Graham, No. 08-7412, at 22-27 & 22 n.44 (filed July 2009).

Contrary to the above research and case studies, the 2005 amendments to RCW 71.09.090 mandate that the court may not order a full re-commitment hearing based on a "demographic factor" such as age. RCW 71.09.090(4)(c). Ward's case illustrates that assessing a person's serious inability to control future behavior may be fundamentally altered by emerging scientific research tied to the person's age. Likewise, the State's expert in McCuistion's case agreed that behaviors and fantasies used to diagnosis a mental abnormality "often diminish with advancing age in adults." CP 65 (evaluation of Carole Van Dam, quoting Am. Psychiatric

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[4] In Graham, the Supreme Court relied on emerging scientific evidence of juvenile brain development to rule that it violates the Eighth Amendment's cruel and unusual punishment clause to impose a sentence of life without the possibility of parole on a person who committed any offense other than homicide

Ass'n, Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR (4th rev. ed. 2000)).

Involuntary commitment under RCW 71.09 rests largely on psychological experts who rely on the evolving sciences of diagnosing and predicting the existence of mental disorders and their connection to a person's current likelihood of committing similar acts in the future. The 2005 amendments to RCW 71.09.090 mandate that no person may receive a full hearing on annual review even when a scientific consensus emerges that undermine the basis for continuing commitment. These new substantive criteria unmoor the commitment scheme from the outside limits set by the constitution.

3. THE 2005 AMENDMENTS SUBSTANTIVELY ALTER THE CRITERIA FOR OBTAINING A RELEASE TRIAL FOR BOTH STATE AND DETAINEE

The amended version RCW 71.09.090 adds substantive, evidentiary requirements that must be satisfied before the court grants any trial on whether a committed person may be released. The new criteria restrict all actors: the secretary, the department, and the detainee. The court may not order a new trial on whether a

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before he turned 18 years old. 130 S.Ct. at 2030.

previously committed person continues to meet the criteria for commitment unless the detained person has changed due to continued treatment participation or physical incapacity.

Because the convoluted language of the statute lends itself to being misunderstood, it benefits from a close reading.[5] The full text of the statute is attached as Appendix B.

Subsection (4) of RCW 71.09.090 applies to all post-commitment review cases. RCW 71.09.090(4)(b) says that any "new trial proceeding" may be held only when the change in the person's condition is based on continued and successful treatment participation or physical incapacity:

> A new trial proceeding under subsection (3) of this section may be ordered, or a trial proceeding may be held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding . . . .

RCW 71.09.090(4)(b). Subsection (3) explains the procedure for holding any full hearing regarding continued commitment. It

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[5] The dissenting opinion in McCuistion said that a committed person has the right to a new release trial any time he can show, or the department agrees, he no longer meets the criteria for commitment under RCW 71.09.090(2), but this mistaken view of the statue disregards RCW 71.09.090(4). 169 Wn.2d at 685 (Owens, J., dissenting). Subsection (4) expressly alters the criteria for when any person may receive a new trial after commitment, and it restricts the State as well as the detainee.

governs a hearing that occurs at either the secretary's request under subsection (1) or detainee's request under subsection (2).

RCW 71.09.090(4)(b) and (c) restrict the evidence any party may use to secure a full re-commitment or release trial in three ways:

> (i) change results from physiological incapacity, "such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent;"
> (ii) change results from successful, continuing treatment; and
> (iii) change may not result from a single demographic factor, such as "a change in the chronological age, marital status, or gender of the committed person."

The State claims that any time the department cannot prove that a person remains mentally ill and dangerous, the court shall set a hearing, citing RCW 71.09.090(2)(c). State's Motion to Reconsider, p. 11. It similarly asserted at oral argument that the State would authorize a new trial when its experts believe a person no longer meets the criteria for confinement. McCuistion, 169 Wn.2d at 644 n.6.

Yet the State agrees, as it must, that .090(4) limits when any trial on continued commitment may occur. It requires that the "change" permitting the trial must result from treatment success or incapacity. State's Motion to Reconsider, p. 12. The State justifies

the substantive limits on when a new trial may occur because "[e]vidence that is not treatment-based or physiological is not worthy of a new trial." Id. Consequently, any change prompting a new trial must be the result of continued successful treatment participation or permanent physiological damage, and may not be due to a change in the person's age. It is no longer true that a person receives a new trial even when the State evaluator thinks there is probable cause that a person no longer meets the criteria for commitment.

In addition to setting evidentiary restrictions that are not narrowly tailored to the constitutional requirements of commitment, these restrictions may be arbitrarily applied. A person who takes part in treatment intermittently could be barred from release because the statute requires "continuing" treatment, without regard to the person's reduced likelihood of reoffending. RCW 71.09.090(4)(b)(ii). When the treatment program itself is maintained and operated by the people who also hold the keys to a person's involuntary confinement, the treatment professionals have a "strong institutional bias" not to find a person's treatment successful because that would require release. Jones, 463 U.S. at

378 (Brennan, J., dissenting).[6] A person may have a disorder that is not amenable to treatment, but may become so old that the likelihood of committing another offense is minimal, and yet .090(4) would prohibit him from having the trial necessary for release. The changes to the annual review statute block individuals from obtaining trials on their continued confinement even when reasonable, reliable scientific evidence shows the person does not meet the criteria for commitment.

4. THE APPROPRIATENESS OF THE PRE-2005 ANNUAL REVIEW PROTOCOL IS NOT AT ISSUE.

In its motion for reconsideration, the State focuses on what it sees as inadequacies in the pre-2005 annual review scheme. These arguments offer the Court a false choice. The issue is not whether the annual review statute could be written differently. The issue here is whether the amended version results in a constitutionally impermissible scheme of indefinite confinement.

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[6] "[S]trong institutional biases lead [mental health professionals] to err when they attempt to determine an individual's dangerousness, especially when the consequence of a finding of dangerousness is that an obviously mentally ill patient will remain within their control," citing American Psychiatric Assn., Task Force Report on Clinical Aspects of the Violent Individual 24 (1974) and Monahan & Cummings, Prediction of Dangerousness as a Function of its Perceived Consequences, 2 J.Crim.Justice 239 (1974).

The State expresses a desire to make treatment participation a greater incentive to those detained. The State's interest in promoting treatment may not substitute for the constitutional predicate for involuntary confinement. See Levias, 83 Wn.2d at 257 (impermissible to detain person simply to offer beneficial treatment).

The effectiveness of sex offender treatment is unclear. Many studies on its effectiveness "do not use the best research methods."[7] Two recent studies, both considered well-designed, reached "opposite conclusions about the effectiveness of sex offender treatment." Id. No studies have addressed whether treatment is effective for the type of offenders who are civilly committed. Id. at 55.

The State never acknowledges that part of the reason it has not had greater treatment participation among detainees likely stems from the State's historical resistance to offering treatment. In 1994, a jury found the SCC did not provide the bare minimum of constitutionally adequate treatment to civilly committed individuals.

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[7] Minnesota Office of the Legislative Auditor, Evaluation Report, Civil Commitments of Sex Offenders, p. 54 (March 2011), available at: http://www.auditor.leg.state.mn.us/.

Sharp v. Weston, 233 F.3d 1166, 1168 (9th Cir. 2000).[8] From 1994 until 2007, the SCC was under federal court mandate to create a meaningful treatment program at the SCC. Turay v. Richards, 2007 WL 983132 (W.D. WA 2007), aff'd, 2009 WL 229838 (9th Cir. 2009).[9] The federal court found the SCC's treatment providers "departed so substantially from professional minimum standards" that they must not have based their decisions and practices on professional judgment. Turay v. Selig, 108 F.Supp.2d 1148, 1158-59 (W.D. Wash. 2000).

Federal oversight lasted as long as it did because the State showed recalcitrance toward and outright contempt for the federal court's orders that the State improve the conditions of confinement, particularly with respect to its treatment program. See Turay, 2007 WL 983132, *2 (contempt sanctions accrued from 1998 until 2004). Even in 2009, the federal court found that SCC conditions are "far from ideal" and SCC was simply meeting the constitutionally minimum requirements. Turay, 2009 WL 229838 at *1.

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[8] The Ninth Circuit refused to dissolve the injunction in 2000, holding, "Based on the numerous inadequacies noted by the district court, . . . SCC still does not provide the type of treatment program that is constitutionally required for civilly-committed persons . . . ." Sharp, 233 F.3d at 1172.

[9] Unpublished federal decisions may be cited. FRAP 32.1; GR 14.1.

McCuistion entered the SCC in 1998. His failure to continually participate in the SCC's treatment program was used to bar him from obtaining a full review of whether he meets the criteria for confinement notwithstanding the documented inadequacies of that program during his period of confinement. CP 585.

The State claims that reverting to the probable cause standard used on the pre-2005 annual review statute allows for too much process, because too many people will obtain new trials. It is worth noting that despite the sky-will-fall predictions of the State's amicus briefs filed in support of reconsideration, the statute in existence from 1990-2005 did not unleash hordes of re-commitment trials annually or undermine the State's ability to maintain a significant number of commitments.

In any event, the legislature may change the annual review process. There is a pending bill intended to alter the annual review procedures, SB 5202 (2011). But any changes to the annual review criteria run afoul of the constitution if they prohibit the court from considering evidence of a person's current circumstances so a person may remain committed even if he is no longer currently mentally ill or dangerous due to that mental illness.

The State also excuses the substantive limits the statute places on securing release through annual review by asserting that a person who no longer meets the criteria for commitment may receive relief through federal habeas corpus petitions, CR 60(b) motions, or personal restraint petitions. There are insurmountable roadblocks to these vehicles and their existence does not excuse the State from providing a meaningful system of annual review. For example, in a recent case, the Court of Appeals agreed with the State that a detainee was procedurally barred from using CR 60(b) to argue that the original commitment order should be overturned based on new evidence. In re Det. of Mitchell, _ Wn.App. _, 2011 WL 882006, *2 (Mar. 15, 2011). It also held that "CR 60(b) is not the means by which an SVP may challenge orders that continue confinement as an SVP following an annual review hearing under RCW 71.09.090." Id. at *4.[10]

It is the State's obligation to provide meaningful annual review. Young, 122 Wn.2d at 39. The harm to an individual who is indefinitely confined requires the State to bear the risk of error. Addington v. Texas, 441 U.S. 418, 426, 99 S.Ct. 1804, 60 L.Ed.2d

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[10] Further discussion of the procedural hurdles of CR 60(b), personal restraint petitions, and federal habeas petitions under 18 U.S.C. § 2254 may be

323 (1979). The State's desire for long-term confinement and its hope that treatment reduces dangerousness may not be translated into an evidentiary mandate divorced from the constitutional safeguards required of any such scheme.

McCuistion offered evidence from an expert whose credentials the State did not challenge and the court did not question. The expert opined that McCuistion did not have a current mental disorder rendering him dangerous beyond his control. CP 616-17. McCuistion supported this expert opinion by offering factual evidence demonstrating his changed behavior as well as statistical studies showing he did not pose to requisite level of dangerousness. CP 590-615, 637-94.

Confined involuntarily at the SCC since 1998, McCuistion showed the staff members who interacted with him on a daily basis that he is diligent, responsible, and respectful. CP 637-48. His observed and verified pattern of daily behavior stands in contrast to other committed individuals who are involved in on-going criminal or sexual escapades, as the trial court acknowledged. CP 585, 594. The trial court disregarded McCuistion's proffered evidence

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found in Petitioner's Supplemental Brief, at 14-18.

and refused to order a full hearing on the grounds that he did not participate in the SCC's treatment program and he had not proven that his expert's opinion was more correct than the State's evaluators, which is contrary to the standard of review. Petersen, 145 Wn.2d at 803. The trial court impermissibly weighed the evidence and relied on the mandatory treatment criteria of the 2005 amendments to RCW 71.09.090 to deny McCuistion a hearing on whether he continues to meet the criteria for indefinite commitment. The invalidity of the trial court's decision requires a new hearing at which McCuistion's continued confinement is fairly evaluated based on whether he is presently confined pursuant to a current mental disorder that causes him to the dangerous beyond his control.

B. CONCLUSION.

For the foregoing reasons, Mr. McCuistion respectfully requests this Court order he receive a re-commitment trial.

DATED this 18th day of March 2011.

Respectfully submitted,

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APPENDIX A

K.S.A. 59-29a08

(a) Each person committed under K.S.A. 59-29a01 et seq., and amendments thereto, shall have a current examination of the person's mental condition made once every year. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for release over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall also forward the annual report, as well as the annual notice and waiver form, to the court that committed the person under K.S.A. 59-29a01 et seq., and amendments thereto. The person may retain, or if the person is indigent and so requests the court may appoint a qualified professional person to examine such person, and such expert or professional person shall have access to all records concerning the person. The court that committed the person under K.S.A. 59-29a01 et seq., and amendments thereto, shall then conduct an annual review of the status of the committed person's mental condition. The committed person shall have a right to have an attorney represent the person at the hearing but the person is not entitled to be present at the hearing.

(b) Nothing contained in K.S.A. 59-29a01 et seq., and amendments thereto, shall prohibit the person from otherwise petitioning the court for discharge at this hearing.

(c)(1) If the court at the hearing determines that probable cause exists to believe that the person's mental abnormality or personality disorder has so changed that the person is safe to be placed in transitional release, then the court shall set a hearing on the issue.

(2) The court may order and hold a hearing when:

(A) There is current evidence from an expert or professional person that an identified physiological change to the committed person, such as paralysis, stroke or dementia, that renders the committed person unable to commit a sexually violent offense and this change is permanent; and

(B) the evidence presents a change in condition since the person's last hearing.

(3) At either hearing, the committed person shall be entitled to be present and entitled to the benefit of all constitutional protections that were afforded the person at the initial commitment proceeding. The attorney general shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to have experts evaluate the person on the person's behalf and the court shall appoint an expert if the person is indigent and requests an appointment. The burden of proof at either hearing shall be upon the state to prove beyond a reasonable doubt that the committed person's mental abnormality or personality

disorder remains such that the person is not safe to be placed in transitional release and if transitionally released is likely to engage in acts of sexual violence.

(d) If, after the hearing, the court or jury is convinced beyond a reasonable doubt that the person is not appropriate for transitional release, the court shall order that the person remain in secure commitment. Otherwise, the court shall order that the person be placed in transitional release.

(e) If the court determines that the person should be placed in transitional release, the secretary shall transfer the person to the transitional release program. The secretary may contract for services to be provided in the transitional release program. During any period the person is in transitional release, that person shall comply with any rules or regulations the secretary may establish for this program and every directive of the treatment staff of the transitional release program.

(f) At any time during which the person is in the transitional release program and the treatment staff determines that the person has violated any rule, regulation or directive associated with the transitional release program, the treatment staff may remove the person from the transitional release program and return the person to the secure commitment facility, or may request the district court to issue an emergency ex parte order directing any law enforcement officer to take the person into custody and return the person to the secure commitment facility. Any such request may be made verbally or by telephone, but shall be followed in written , facsimile or electronic form delivered to the court by not later than 5:00 p.m. of the first day the district court is open for the transaction of business after the verbal or telephonic request was made.

(g) Upon the person being returned to the secure commitment facility from the transitional release program, notice thereof shall be given by the secretary to the court. The court shall set the matter for a hearing within two working days of receipt of notice of the person's having been returned to the secure commitment facility and cause notice thereof to be given to the attorney general, the person and the secretary. The attorney general shall have the burden of proof to show probable cause that the person violated conditions of transitional release. The hearing shall be to the court. At the conclusion of the hearing the court shall issue an order returning the person to the secure commitment facility or to the transitional release program, and may order such other further conditions with which the person must comply if the person is returned to the transitional release program.

CREDIT(S)

Laws 1994, ch. 316, § 8; Laws 1995, ch. 193, § 7; Laws 1998, ch. 198, §

4; Laws 2003, ch. 152, § 5; Laws 2007, ch. 170, § 5, eff. July 1, 2007; Laws 2010, ch. 5, § 5, eff. March 11, 2010.

APPENDIX B

Rev. Code Wash. (ARCW) § 71.09.090 (2008)

§ 71.09.090. Petition for conditional release to less restrictive alternative or unconditional discharge -- Procedures

(1) If the secretary determines that the person's condition has so changed that either: (a) The person no longer meets the definition of a sexually violent predator; or (b) conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that adequately protect the community, the secretary shall authorize the person to petition the court for conditional release to a less restrictive alternative or unconditional discharge. The petition shall be filed with the court and served upon the prosecuting agency responsible for the initial commitment. The court, upon receipt of the petition for conditional release to a less restrictive alternative or unconditional discharge, shall within forty-five days order a hearing.

(2) (a) Nothing contained in this chapter shall prohibit the person from otherwise petitioning the court for conditional release to a less restrictive alternative or unconditional discharge without the secretary's approval. The secretary shall provide the committed person with an annual written notice of the person's right to petition the court for conditional release to a less restrictive alternative or unconditional discharge over the secretary's objection. The notice shall contain a waiver of rights. The secretary shall file the notice and waiver form and the annual report with the court. If the person does not affirmatively waive the right to petition, the court shall set a show cause hearing to determine whether probable cause exists to warrant a hearing on whether the person's condition has so changed that: (i) He or she no longer meets the definition of a sexually violent predator; or (ii) conditional release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community.

(b) The committed person shall have a right to have an attorney represent him or her at the show cause hearing, which may be conducted solely on the basis of affidavits or declarations, but the person is not entitled to be present at the show cause hearing. At the show cause hearing, the prosecuting attorney or attorney general shall present prima facie evidence establishing that the committed person continues to meet the definition of a sexually violent predator and that a less restrictive alternative is not in the best interest of the person and conditions cannot be imposed that adequately protect the community. In making this showing, the state may rely exclusively upon the annual report prepared pursuant to *RCW 71.09.070*. The committed person may present responsive affidavits or declarations to which the state may reply.

(c) If the court at the show cause hearing determines that either: (i) The state has failed to present prima facie evidence that the committed person continues to meet the definition of a sexually violent predator and that no proposed less restrictive alternative is in the best interest of the person and conditions cannot be imposed that would adequately protect the community; or (ii) probable cause exists to believe that the person's condition has so changed that: (A) The person no longer meets the definition of a sexually violent predator; or (B) release to a proposed less restrictive alternative would be in the best interest of the person and conditions can be imposed that would adequately protect the community, then the court shall set a hearing on either or both issues.

(d) If the court has not previously considered the issue of release to a less restrictive alternative, either through a trial on the merits or through the procedures set forth in *RCW 71.09.094(1)*, the court shall consider whether release to a less restrictive alternative would be in the best interests of the person and conditions can be imposed that would adequately protect the community, without considering whether the person's condition has changed.

(3) (a) At the hearing resulting from subsection (1) or (2) of this section, the committed person shall be entitled to be present and to the benefit of all constitutional protections that were afforded

to the person at the initial commitment proceeding. The prosecuting agency or the attorney general if requested by the county shall represent the state and shall have a right to a jury trial and to have the committed person evaluated by experts chosen by the state. The committed person shall also have the right to a jury trial and the right to have experts evaluate him or her on his or her behalf and the court shall appoint an expert if the person is indigent and requests an appointment.

(b) If the issue at the hearing is whether the person should be unconditionally discharged, the burden of proof shall be upon the state to prove beyond a reasonable doubt that the committed person's condition remains such that the person continues to meet the definition of a sexually violent predator. Evidence of the prior commitment trial and disposition is admissible.

(c) If the issue at the hearing is whether the person should be conditionally released to a less restrictive alternative, the burden of proof at the hearing shall be upon the state to prove beyond a reasonable doubt that conditional release to any proposed less restrictive alternative either: (i) Is not in the best interest of the committed person; or (ii) does not include conditions that would adequately protect the community. Evidence of the prior commitment trial and disposition is admissible.

(4) (a) Probable cause exists to believe that a person's condition has "so changed," under subsection (2) of this section, only when evidence exists, since the person's last commitment trial proceeding, of a substantial change in the person's physical or mental condition such that the person either no longer meets the definition of a sexually violent predator or that a conditional release to a less restrictive alternative is in the person's best interest and conditions can be imposed to adequately protect the community.

(b) A new trial proceeding under subsection (3) of this section may be ordered, or held, only when there is current evidence from a licensed professional of one of the following and the evidence presents a change in condition since the person's last commitment trial proceeding:

(i) An identified physiological change to the person, such as paralysis, stroke, or dementia, that renders the committed person unable to commit a sexually violent act and this change is permanent; or

(ii) A change in the person's mental condition brought about through positive response to continuing participation in treatment which indicates that the person meets the standard for conditional release to a less restrictive alternative or that the person would be safe to be at large if unconditionally released from commitment.

(c) For purposes of this section, a change in a single demographic factor, without more, does not establish probable cause for a new trial proceeding under subsection (3) of this section. As used in this section, a single demographic factor includes, but is not limited to, a change in the chronological age, marital status, or gender of the committed person.

(5) The jurisdiction of the court over a person civilly committed pursuant to this chapter continues until such time as the person is unconditionally discharged.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE DETENTION OF DAVID MCCUISTION, PETITIONER.	)))))))	NO. 81644-1

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **PETITIONER'S BRIEF ON RECONSIDERATION** TO BE FILED IN THE **COURT WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF MARCH, 2011.

X_____

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